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JOSEPH E. SPANIOL, JR.

No. 88-252

In the Supreme Court of the United States

OCTOBER TERM, 1988

BILLY H. HARTNESS AND BRENDA K. KEENER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the materiality of false statements under 18 U.S.C. 1001 is a question to be decided by the court rather than by the jury.

2. Whether application of the false statement proscription of 18 U.S.C. 1001 to petitioners' intentional misrepresentation of expected earnings violated petitioners' due process rights.

3. Whether an enhanced penalty statute was properly applied to petitioners' criminal conspiracy, where the conspiracy commenced before the effective date of the statute but extended for more than a year after the effective date.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 845 F.2d 158.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1988. A petition for rehearing was denied on June 13, 1988. The petition for a writ of certiorari was filed on August 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners were con-

victed of conspiracy to defraud the United States through the submission of false statements to the Farmers Home Administration (Count 1), in violation of 18 U.S.C. 371. In addition, petitioner Hartness was convicted on one count (Count 6), and petitioner Keener on two counts (Counts 5 and 10), of making false statements to the government, in violation of 18 U.S.C. 1001. Hartness was sentenced to two years' imprisonment and fined $50,000 on Count 1; he was placed on probation for three years on Count 6. Keener was sentenced to two years' imprisonment and fined $5,000 on Count 1; she was placed on probation for three years on the other counts. Pet. 3. The court of appeals affirmed (Pet. App. 1a-11a).

1. The evidence, which is summarized in the opinion of the court of appeals, showed that Hartness was engaged in the business of constructing single family homes in the vicinity of Monticello, Arkansas. Keener, who is a certified public accountant, was employed by Hartness. She also operated a realty company out of an office furnished by Hartness.

Most of the houses sold by Keener were built by Hartness and financed by the Farmers Home Administration (FmHA) under its Rural Housing Program, which provided low interest loans to qualified home buyers. Applicants for loans were required to submit sundry financial information, including information about employment and income. The evidence showed that, between March 1983 and October 1986, petitioners assisted more than 15 individuals in the falsification of information in various documents connected with their loan applications to the FmHA.

In particular, petitioners assisted in falsifying documents related to the house purchased by Michael and Deedra Grubb. From January 1983 to February 1985, Michael Grubb was employed by Hartness as a part-time

bookkeeper while Grubb attended college. Keener was his immediate supervisor. Shortly before his marriage, Grubb was told by Keener that she could arrange for him to acquire a house in a new subdivision that Hartness was constructing. Keener prepared an FmHA application for Grubb. The application stated that Grubb worked 40 hours per week, 52 weeks per year, and earned $3.45 per hour, for an annual total of $7,176. The figures were high enough to qualify Grubb for a Rural Housing Program loan. The application, which became the subject of Count 5 of the indictment, did not mention that Grubb was at the time a full-time student.

Among the documents that the FmHA required were Verification of Employment forms. Grubb and Keener filled out three such forms, and Hartness signed all three. On the first form, dated March 8, 1984, Grubb incorrectly reported his base pay, his past year's income, and the number of hours he worked per week. On the second form, dated July 2, 1984, Grubb reported an increase in hourly wages to $3.90 and continued to represent himself as a full-time employee. Keener told Grubb that, to avoid showing a large increase in income, his wife should not seek employment until after the closing on the house had been completed.

Because of his marriage, Grubb's earnings as set forth on the second form were insufficient to entitle him to a federal loan. Accordingly, on August 21, 1984, a third Verification of Employment form, containing different figures, was filled out. This time the form indicated that Grubb worked full time all year; that he earned $4.25 per hour; that his past year's income was $8,211; and that his expected income for the following year would be approximately $10,000. In fact, Grubb was earning less than $4.25 per hour on August 21; his previous year's income was less than $8,211; and he was not projected to earn $10,000 as a

full-time employee because he did not work full time. The third Verification of Employment form signed by Hartness was the basis for his conviction on Count 6.

2. At trial petitioners argued that the materiality of their allegedly false statements should be determined by the jury. The trial judge rejected that contention and determined that the statements in question were material as a matter of law. The court instructed the jury that materiality was an element of the offense, that the question of materiality was not for the jury to decide, and that the statements charged in the indictment were material.

3. On appeal, petitioners argued that Counts 5 and 6, which charged that petitioners misrepresented Grubb's annual income, failed to state an offense because "it is legally impossible to falsify a projection of future events" (Pet. App. 5a). The court of appeals rejected that contention, concluding that, although projections may be less precise than other statements, a deliberate misrepresentation of the annual income that is actually expected based on known facts is a false statement (*id.* at 4a-7a). Because petitioners' statements of projected income were just such misrepresentations, they were false (*id.* at 7a-9a). The court further ruled that the issue of the materiality of the false statements was correctly decided by the district court rather than by the jury (*id.* at 8a n.4) and that the statements of annual income were material because they were "capable of or had a natural tendency to influence the FmHA" (*id.* at 8a). In addition to rejecting various other challenges, the court also held that petitioner Hartness was lawfully subject to a $50,000 fine under 18 U.S.C. (Supp. IV) 3623, which allows fines up to $250,000 for offenses that occur after December 31, 1984. The court observed that Hartness was convicted of a conspiracy that began in 1983 and continued through December 9, 1986, and that

30 overt acts committed in 1985 were proved and submitted to the jury. Pet. App. 11a.

ARGUMENT

1. Petitioners first contend (Pet. 7-11) that the question of materiality under 18 U.S.C. 1001 is a factual question for the jury, not a legal question for the court. The court of appeals correctly rejected that contention.

The great majority of the courts of appeals have held that materiality under Section 1001 is a question of law for the court rather than one of fact for the jury, and this Court has repeatedly declined to review those decisions. See, *e.g.*, *United States* v. *Holley*, 826 F.2d 331, 335 (5th Cir. 1987), cert. denied, No. 87-982 (Mar. 21, 1988); *United States* v. *Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States* v. *Keefer*, 799 F.2d 1115, 1126 (6th Cir. 1986); *United States* v. *Greenwood*, 796 F.2d 49, 55 (4th Cir. 1986); *United States* v. *Brantley*, 786 F.2d 1322, 1327 (7th Cir.), cert. denied, 477 U.S. 908 (1986); *United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Greber*, 760 F.2d 68, 72-73 (3d Cir.), cert. denied, 474 U.S. 988 (1985); *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362, 367 (4th Cir.), cert. denied, 474 U.S. 818 (1985); *United States* v. *Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967).[1]

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[1] Near the end of the last Term the Court denied a petition for a writ of certiorari raising this precise issue. *United States* v. *Gibson*,

This array of authority treating materiality as an issue of law accords with this Court's recognition in *Sinclair* v. *United States,* 279 U.S. 263, 298 (1929), that the materiality of false statements generally is a question for the court. That understanding was recently reaffirmed in *Kungys* v. *United States,* No. 86-228 (May 2, 1988). The Court there held that materiality under 8 U.S.C. 1451 is a legal question. In so holding, the Court quoted with approval the Sixth Circuit's *Abadi* decision holding materiality to be a legal question under 18 U.S.C. 1001.

As petitioners point out (Pet. 8), the Ninth and Tenth Circuits have taken a different position on materiality under 18 U.S.C. 1001. See *United States* v. *Irwin,* 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez,* 594 F.2d 725, 729 (9th Cir. 1979).[2] Those decisions, however, do not create a conflict warranting this Court's review. First, neither circuit has addressed the question since this Court's decision in *Kungys,* and both courts have declined to extend the rulings on Section 1001 to other statutes involving the issue of materiality.[3] Both circuits can be expected to re-

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838 F.2d 463 (3d Cir. 1987), cert. denied, No. 87-6426 (May 16, 1988). The Court denied another petition raising the issue on October 3, 1988. *Greenberg* v. *United States,* No. 87-1886.

[2] As petitioners state (Pet. 8), the Second Circuit has concluded that materiality is not an element of a false-statements offense under 18 U.S.C. 1001. *United States* v. *Elkin,* 731 F.2d 1005, cert. denied, 469 U.S. 822 (1984). Of course, that position would be more adverse to petitioners than the Eighth Circuit's view in this case; and if the Second Circuit's view is correct, any variation among the circuits on the materiality issue is entirely academic.

[3] Thus, in several recent decisions applying statutes other than 18 U.S.C. 1001, the Ninth Circuit has held that materiality is an issue of law to be decided by the court. See *United States* v. *Martinez,* 837 F.2d 900, 902 (1988); *United States* v. *Larm,* 824 F.2d 780, 783-784 (1987), cert. denied, No. 87-907 (Feb. 22, 1988); *United States* v.

consider the matter in light of *Kungys*. Moreover, to our knowledge, neither circuit has actually overturned a conviction under Section 1001 on the ground that the issue was not submitted to the jury. The Ninth Circuit has twice held that a trial court erred in not submitting the issue to the jury, but in both cases the court affirmed the convictions because it was clear that the statements at issue were material. *United States* v. *Valdez*, 594 F.2d at 728-729; *United States* v. *East*, 416 F.2d 351, 354-355 (1969). The Tenth Circuit has approved the practice of submitting the issue of materiality to the jury, but it has not considered whether it is reversible error for a trial court to decide the issue itself. See *United States* v. *Irwin*, 654 F.2d at 677 n.8 and cases cited therein.

In any event, the statements involved in this case were material beyond any doubt. The highly desirable low interest loans available through the FmHA Rural Housing Program were obtainable only by individuals who had sufficient income and whose stable employment history provided some reasonable assurance that the loans would be repaid. See Tr. 39-49. It was precisely in order to meet the program's requirements that petitioners falsified the loan documents submitted to the FmHA. As the court of appeals concluded (Pet. App. 8a (footnote omitted)), "[c]ertainly a statement of income on a loan application is capable of influencing the officials empowered to approve

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Flake, 746 F.2d 535, 537 (1984), cert. denied, 469 U.S. 1225 (1985); *United States* v. *Prantil*, 764 F.2d 548, 557 (1985). And the Tenth Circuit has recently held that materiality in a perjury case is a question for the court. *United States* v. *Larranaga*, 787 F.2d 489, 494 & n.1 (1986). The court there acknowledged that materiality is properly treated as an issue of law under 26 U.S.C. 7206(1), which covers the filing of false tax returns, and stated: "[w]e need not determine today whether we should continue to treat § 1001 in [a contrary] fashion" (787 F.2d at 494 n.1).

or disapprove the loan." Petitioners' misstatements were therefore material. *United States* v. *Irwin*, 654 F.2d at 677; *United States* v. *Valdez*, 594 F.2d at 728.

2. Counts 5 and 6 of the indictment charged that petitioners knowingly made false representations of Grubb's annual income, in violation of Section 1001. Petitioners contend (Pet. 12-19) that their convictions on those charges violated their due process rights to fair notice and an ascertainable standard of guilt because the false statements were merely subjective predictions of future earnings. The court of appeals correctly rejected petitioners' argument (Pet. App. 4a-7a).

Petitioners were not charged with or convicted of making good faith predictions of earnings that subsequently failed to materialize. Rather, the evidence showed that petitioners knowingly made statements of income that had no foundation in the facts as they knew them at the time. The projections at issue were based on a simple formula requiring that the number of hours worked per week be multiplied by the number of weeks worked per year and by the hourly wage. Petitioners were charged with and convicted of knowingly misstating the components of the formula. Certainly for persons in the real-estate business, like petitioners, there was no lack of fair notice in being charged with knowingly falsifying the projection of annual income, and there was a clear, ascertainable, objective standard of guilt: whether petitioners knowingly misrepresented the facts as they knew them at the time of their projections.

3. Petitioner Hartness challenges (Pet. 19-23) the district court's imposition, as part of the sentence for the conspiracy conviction, of a $50,000 fine under 18 U.S.C. (Supp. IV) 3623, arguing that the fine was unconstitutionally retroactive because the conspiracy did not take place after the effective date of Section 3623 (December

31, 1984). That question is of no continuing importance, because Section 3623 has been repealed. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. In any event, there is no circuit-court conflict on the question, and the court of appeals correctly rejected petitioner Hartness's contention (Pet. App. 11a).

The conspiracy count charged that the unlawful agreement commenced on or about January 5, 1983, and continued through December 9, 1986, the date of the indictment. The charge set forth 65 overt acts, and the evidence showed that 30 of them were committed after December 31, 1984. Because the conspiracy continued past the effective date of Section 3623, the crime was within the coverage of the provision. See *United States* v. *Giry,* 818 F.2d 120, 134-135 (1st Cir. 1987), cert. denied, No. 87-235 (Oct. 5, 1987); *United States* v. *Gibbs,* 813 F.2d 596, 601-602 (3d Cir. 1987), cert. denied, No. 86-1890 (Oct. 5, 1987); *United States* v. *Baresh,* 790 F.2d 392, 404 (5th Cir. 1986); *Huff* v. *United States,* 192 F.2d 911, 914-915 (5th Cir. 1951), cert. denied, 342 U.S. 946 (1952). Also, contrary Hartness's present suggestion (Pet. 20-21)—a suggestion that he did not make in his briefs in the court of appeals—no special jury finding was needed on the timing of the conspiracy. The jury verdict "represents a finding that the conspiracy was committed as alleged, and that [Hartness] participated throughout the conspiracy." *Leyvas* v. *United States,* 371 F.2d 714, 717 (9th Cir. 1967).[4]

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[4] In *United States* v. *Borelli,* 336 F.2d 376, 384-387 (2d Cir. 1964), on which petitioner relies (Pet. 22-23), the indictment charged a single conspiracy involving numerous defendants and numerous overt acts. Because the evidence was ambiguous on whether there was only one conspiracy involving all of the defendants or whether there were instead several conspiracies, each involving different defendants and some ending years prior to the applicable limitations period, the court required specific instructions on the scope of particular defendants'

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER 1988

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agreements to join in criminal activity. The court noted (336 F.2d at 385): "By no means every conspiracy trial will raise the problem here considered." In the present case, there was clearly only one conspiracy, which involved both petitioners throughout, and there were numerous overt acts in furtherance of the conspiracy within the period covered by Section 3623.

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